1. The decision of the House of Lords in Barker v Corus [2006] UKHL 20 underlines the difficulty faced by the courts when there is a departure from the underlying principles of the law of tort. One departure from principle inevitably gives rise to consequential problems and as Lord Rodger described in his dissenting opinion:

“the exception turns into an enclave where a number of rules apply which have been rejected for use elsewhere in the law of personal injuries”.

2. The exception to the general principles set out in Fairchild Glenhaven Funeral Services Ltd [2002] UKHL 22, [2003] 1 AC 32 was made for good reason. There was a recognised injustice if a Claimant who satisfied the six requirements set out by Lord Bingham could not recover damages. That is a Claimant who:

   a. Who was employed at different times and for different periods by A and B
   b. A and B were both under a duty of care to take reasonable steps to prevent the Claimant inhaling asbestos dust knowing it might cause the Claimant damage
c. Both A and B were in breach of duty and allowed the Claimant to be exposed to excessive amounts of asbestos dust
d. The Claimant suffered mesothelioma
e. Other cause of the Claimant’s injury could be discounted
f. The Claimant could not prove on a balance of probabilities whether it was A or B who was responsible for the inhalation that actually caused the damage.

3. There was an obvious injustice to the Claimant of not being able to recover against either A or B, when both were in breach of duty, because each could rely on the possibility the injury was caused by the other. However the Claimant had no way of proving to a balance of probabilities standard which was responsible. The House of Lords found it was necessary to depart from the balance of probabilities test.

4. This departure was expressed to be a limited and specific one and not to change the principles upon which causation in personal injury claims should be determined. The fact that it was a limited departure and should not be applied by analogy to other circumstances where a Claimant had difficulty proving causation on a balance of probabilities test was confirmed by the majority decision in Gregg v Scott [2003] 1 AC 32. The concept of a universal test of partial recovery for increased risks of injury which did not allow proof of injury on a more than 50% balance of probabilities basis was ultimately rejected.
5. To many Claimant lawyers this was seen as a relief. Any implementation of a comprehensive system which allowed recovery where the Claimant could not satisfy the balance of probabilities test would ultimately lead to a situation where all Claimants could only recover in proportion to the extent to which they could prove injury. What I believe has always been patently clear is that Claimants cannot have it both ways. As Lady Hale described in Gregg v Scott it cannot be the situation that the Claimant can say “heads you lose everything, tails I win something”. Claimants cannot expect to argue that if causation is proved on a balance of probabilities the Claimant gets 100% of the damages but if causation is proved to less than 50% the Claimant still gets the smaller percentage as a loss of a chance. If the law were to change to allow a Claimant to recover for the increased risk or the possibility of injury being caused by the Defendant but not the probability that the Defendant caused the injury, then the Claimant would always recover less than 100% damages. That is the Claimant could only recover to the extent that of proof of causation, be that 10%, 40%, 60% or 90%. The disadvantage of this change in approach for Claimants was specifically addressed by Lord Phillips and Lady Hale in Gregg v Scott. Ultimately Gregg v Scott neither changed the principles for recovery of damages in personal injury claims nor provided a new exception in cancer treatment cases.
6. In Barker v Corus the Courts had to deal with the problem already created by the exception formulated in Fairchild. In one case there was an issue as to whether the case came within the Fairchild exception territory at all. In Fairchild all of the contenders for causing the damage were tortfeasors, that is the issue was which of a number of employers had been responsible for the offending dust. On any view each was a tortfeassor. In Barker v Corus in one case the Claimant had been self employed for a period and his widow accepted before the House of Lords the deceased was himself responsible for allowing himself to work with asbestos dust, that could have been the offending period. Both Lord Walker and Lord Rodger expressed some doubt about the finding that the deceased was himself responsible and raised the issue as to whether the owner or occupier of the buildings in which he had worked should not have been liable. [paras 96 and 116]. Moses J included the case as a Fairchild exception but made a reduction for contributory negligence and the C of A agreed.

7. The House of Lords also found this case should come within the Fairchild territory. As Lord Hoffmann pointed out it cannot right that all the contenders for loss must be tortfeasors as it may be that exposure to risk has bridged a period when an employer could not have known of the risks and therefore not been liable for the entire period of time, that employer would only be a tortfeassor for the period when the risk was recognised. To then exclude a period because the Claimant
himself was responsible for some period would not be creditable.

8. The House of Lords therefore extended the Fairchild exception to cases where contenders for causation were not necessarily all tortfeasors but emphasised that the causative agent must be a single identifiable agent. That is, it must clear that the cause of the injury was asbestos dust even if it is not clear that the exposure to such dust was always caused tortiously. What does not come within the exception is a situation where the injury could be caused by dust or could be caused by smoking. To extend Fairchild to cases where the causative agent was not identifiable would be to attack the reasoning in Wilsher v Essex Area Health Authority [1988] AC 1074 which is clearly intended to be unaffected by the Fairchild exception.

9. Once a case comes within the Fairchild exception as being a single agent damage case in which the state of scientific knowledge prevents the Claimant proving who was responsible for the relevant exposure to that damaging agent the problem arises as to what extent the identified tortfeasor Defendants are liable. None has been proved to be liable on a balance of probabilities but each may be liable. The issue is are they all joint and severally liable or is each liable for the percentage prospect that they are responsible. In the world of the exception there is no easy answer. The blunt answer is that it is a matter of policy.
10. The majority of the House of Lords considered that as a matter of policy it was sufficiently harsh on Defendants to make them responsible for any damage they might not have caused (despite unarguably being in breach of duty) without making them jointly and severally liable for all of it. Each should be responsible for the proportion the Judge thought was fair, probably worked out roughly in accordance with the proportion of time that employer was responsible for exposing the Claimant to the offending agent or asbestos. This is a clear compromise, a balancing exercise intended to produce a fair result in an exceptional situation. It does not purport to be based on principle and is expressly confined to the particular circumstances of the Fairchild exception.

11. Lady Hale described how:

"On the one hand, the Defendants are by definition in breach of their duties towards the Claimants or the deceased. But then so are many employers, occupiers of other Defendants who nevertheless escape liability altogether because it cannot be shown that their breach of duty caused the harm suffered by the Claimant. For as long as we have rules of causation, some negligent (or otherwise duty breaking) Defendants will escape liability. The law of tort is not (generally) there to punish people for their behaviour. It is there to make them pay for the damage they have done. These Fairchild Defendants may not have
caused any harm at all. They are being made liable because it is thought fair that they should make at least some contribution to redressing the harm that may have flowed from their wrongdoing. It seems to me most fair that the contribution they should make is in proportion to the contribution they have made to the risk of that harm occurring.”

12. Lord Rodger in his dissenting Opinion described the solution of the majority as:

“tending to maximise the inconsistencies in the law by turning Fairchild exception into an enclave...inside the enclave victims recover damages for suffering the increased risk of developing mesothelioma (or suffering the loss of a chance of not developing mesothelioma) while just outside patients cannot recover damages for suffering the increased risk of an unfavourable outcome to medical treatment (or suffering the loss of a chance of a favourable outcome to medical treatment). On the other hand, if such a claim had been recognised outside the enclave, the patient would have been entitled to recover damages for the increased likelihood that he would suffer a premature death, whereas inside the enclave a victim who suffers an increased risk of developing mesothelioma cannot recover unless he actually develops it. Inside the enclave Claimant whose husbands die of mesothelioma receive only say 60% of their damages if the court considers that there is a 60% chance that the Defendant caused the death and no other
wrongdoer is solvent or insured. Outside the enclave, Claimants whose husbands are killed in an accident for which the only solvent Defendant is say 5% to blame recover the whole of their damages from that Defendant”.

13. Lord Rodger asks: “Why then is the House spontaneously embarking upon this adventure of redefining the nature of the damage suffered by the victims.”

14. The problem lies in the fact that to allow any recovery at all is to make an exception. Once that is done the fairness of making an exception is questioned at every juncture and the principles have to redefined within the world of the exception. What is important is to recognise that the parameters of the exception also define the parameters of the modified principles. Defendants cannot rely of reducing damages to percentages in other situations just as the Claimant in Gregg v Scott could not extend the Faichild exception to a completely different situation.

15. The problem of the exception and how it feeds through into causation and assessment of damages issued is still unresolved in respect of the cost of upbringing claims. The exception created against Claimants in Macfarlane v Tayside Health Board [1999] 3 WLR 1301 that a parent cannot recover the cost of upbringing for a healthy child born as a result of a negligently failed sterilisation has led to protracted litigation as to what can be recovered in respect of the cost of upbringing of
a disabled child born as a result of negligent failure to identify the disability and allow a termination. As Lady Hale stressed in Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266, the exception to the general principles of the law of tort applied in McFarlane should be confined to the McFarlane situation but the exception inevitably affect the assessment of what can be recovered in the case of the disabled child. The Court of Appeal provided some principles in Parkinson as to how the exception could be confined but the House of Lord in Rees v Darlington Memorial Hospitals NHS Trust [2003] QB 20 expressed some doubts about the solution without having to find a solution. Inevitably ultimately the House of Lords will be required to deal with the application of the MacFarlane exception to the assessment of damages in cost of upbringing cases.

16. Exceptions are a necessary compromise in the interests of fairness but they bring with them a trail of further litigation and subsidiary issues. For these issues the Courts have no principles to apply as they have, by definition, left behind the underpinning principles in order to make the exception. For practitioners first instance Judges and the Court of Appeal there is the practical problem of guessing in the absence of principle where the House of Lords will draw the lines delineating a fair result. For academics however these cases clearly provide
fantastic opportunities for debate in an area where nobody can be said to be right or wrong.

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